BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

DOUGLAS HOSCHEK, Appellant, v. CITY OF MERCER ISLAND and STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, Respondents.	SHB NO. 91-42 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

This matter came on for hearing before the Shorelines Hearings Board on the 5th day of August, 1992, at the Mercer Island City Hall, Mercer Island, Washington. Sitting for the Board were Board Members Harold S. Zimmerman, Chairman, Nancy Burnett, Mark Erickson, and David Wolfenbarger with John H. Buckwalter, Administrative Law Judge, presiding. Board members Annette McGee and Robert Jensen read the transcript and reviewed the record.

At issue was the denial by the City of Mercer Island of Douglas J. Hoschek's application for a Shorelines Substantial Development and Variance Permit to build a boat dock on his waterfront property.

Appearances were:

Appellant Douglas J. Hoschek, pro se.

Wayne Stewart, Assistant City Attorney, for respondent City of Mercer Island (hereinafter the City).

Proceedings were taped and were also recorded by Lenore Elliott, CSR, of Gene Barker & Associates, Inc. of Olympia, Washington. The site was visited by the Board, witnesses were sworn and testified, exhibits were examined, and arguments of the parties were considered. From these, the Board makes these

FINDINGS OF FACT

I

The property for which Appellant Hoschek seeks a variance is located on the western Lake Washington shore area of Mercer Island. The main body of the property is upland from the lake and shaped like a frying pan with the only water frontage access provided by a "handle" which is approximately 130' long and 10' feet wide and extends on the north side of the main body of the property from east to west to the shore of Lake Washington.

The access strip is bordered on both sides by fencing which was built by Hoschek and/or by shrubbery. The nature and slope of the strip allows walking down to the water but not the transportation of a boat. At the water end of the strip there are three or four steps which were built by Hoschek and which lead into the water.

II

The property immediately to the north of the Hoschek property is owned by the Radoviches and to the south by the Sayers, each of which has substantially wide waterfront and a dock.

III

Before 1961 a Mrs. Painton owned both the Hoschek and Sayers properties as one undivided lot. Prior to June of 1961, Mrs. Painton applied to the City for a permit to subdivide her property into the two portions of the present Hoscheck/Sayers configuration. This application was approved by the City Planning Commission after a public hearing on July 31, 1961, subject to three conditions, none of which involved the size or shape of what is now the Hoschek property.

IV

In December of 1982, Hoschek purchased the property from Mrs. Painton and in 1983 subdivided it, selling a half interest to his parents. In 1986, the parents applied for a variance from a ten foot setback requirement in the City's Shorelines Management Master Program (SMMP) and Zoning Code to build a mooring pier and boat lift on their ten feet of waterfront. This application was denied by the City and appealed to the Shorelines Hearings Board which affirmed the denial. Frank and Dorothy Hoschek v. City of Mercer Island and State of Washington, Department of Ecology, SHB No. 86-53 (1987).

V

After denial of the variance permit, Hoschek purchased a pontoon boat and moored it at the end of his access strip. Since one could step directly from the land onto the pontoon boat, in effect it acted as a dock. The City obtained a temporary injunction from the King

County Superior Court (the date of which is not in our record) which was followed by a permanent injunction issued on March 12, 1990. City of Mercer v. Frank J. Hoschek et al., King County Superior Court No. 88-2-00269-0 (1990).

Paragraph 6 of the Conclusions of Law in the Permanent Injunction stated that Hoschek "should be enjoined from using any boat or structure attached to or in front of his property as a dock, float, or waterfront structure without a valid permit", and this was affirmed in paragraph 2 of the Order itself.

VI

In 1987, Hoschek purchased back his parents' portion of the property and in 1990, after issuance of the permanent injunction, initiated action to obtain permission to build a boat dock of a different design from the 1986 proposal.

VII

The City's SMMP Section (AA)(1)(a) has a requirement that a minimum ten foot setback from each adjoining property line is required for single family docks and other waterfront structures. The same Section, in 1990, provided that "The above standards may be waived by the owners of adjoining waterfront parcels through an agreement filed with the City of Mercer Island and the King County Department of Records and Elections". Absent such a "waiver" agreement, the SMMP Section (S) alternative method for a waiver of the setback standards was to apply for a variance under the City's SMMP.

VIII

Most of the waterfront lots on Mercer Island have docks and many of these docks do not meet the setback requirements. However, we do not know from the evidence presented to us how many of these nonconforming docks may have been built before requirements were adopted into either the City's SMMP or its Building Code or how many of them were built with an adjoining neighbor's waiver. The evidence indicated that the City had never granted a variance to permit such a condition, that no such variance had ever been applied for except those by Hoschek's parents in 1987 and the present Hoschek application, and that the City had never refused to accept a waiver between neighbors.

Evidence was presented to show that mutual waivers did exist for setback nonconformances between Radovich and his adjoining neighbor to the north of his property, and City testimony elicited that "probably" there were many more such waivers throughout the City, some of which "may" have been purchased from the adjoining neighbor(s).

IX

Hoschek was unable to obtain a waiver agreement from either of his adjoining neighbors, Sayers or Radovich, and in September of 1990 submitted an application for a variance permit to the City. He applied for permission to build a 6' wide dock with a 2' setback on each side of the dock extending 60' feet into Lake Washington with

moorage to be allowed on both sides of the dock. Subsequently, he amended his application to permit a 40' long dock with a mooring "wedge" cut into the extreme waterfront end of the dock.

X

After public hearings and submission and review of recommendations from its employees and a consultant, the City denied the Hoschek application in August of 1991, and Hoschek appealed the decision to this Board in a timely manner.

XI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the parties in this matter. RCW 90.58.180. Since this is an appeal of the denial of a permit, the appellant has the burden of proof. RCW 90.58.180.

II

The Board reviews the denial for consistency with the City's SMMP and the Shoreline Management Act. RCW 90.58.140(1). The City urges that consistency with the Mercer Island Building Code should also be a criterion for the Board's decision.

III

The Board's authority does not extend to determining compliance with zoning codes unless the requirements have been made part of the applicable master program. Posten v. Kitsap County et al., SHB No. 86-46 (1987), Order Granting Summary Judgment.

Here, while the City SMMP has been incorporated into its zoning code, our review of the City SMMP reveals no incorporation of that code into the SMMP, and accordingly our review will be limited to the variance criteria established by the Shorelines Management Act as reflected in the DOE-approved City SMMP.

IV

Hoschek contends that the refusal by his neighbors to grant him a setback waiver, thus forcing him to apply for a variance, constitutes an unfair condition. This Board might very well agree that, in effect, the City through its "waiver" provision forfeited to congenial neighbors the environmental controls with which the City is charged under the SMA and retained those controls only where the adjoining neighbors were not agreeable. Such an automatic variance (although termed a "waiver") could very well be found contrary to RCW 90.58.100(5):

> *Each master program shall contain provisions to allow for (variances which) shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. (emphasis added).*

Certainly the waiver provision entirely evaded any issue of extraordinary circumstances or detriment to the public interest. However, in this appeal the Board's jurisdiction extends only to what is provided for by the provisions found in the Master Program, not to whether the waiver provision should or should not have been there.

The City retained the waiver provision until 1992 when it was removed from the SMMP, but we note that Hoschek is in no worse position now than he would have been had the provision never appeared in the SMMP or if it had been removed before he submitted his application for a variance. Our jurisdiction in this appeal extends only to whether or not Hoschek's application for a variance permit was properly denied by the City, not whether previous "waivers" were illegal, improper, or unfair.

V

Section 19.40.130 (S) of the City SMMP states that the City, with DOE approval,:

> *...may authorize variances from specific requirements of this Section when there are practical difficulties or unnecessary hardships involved with carrying out the strict letter of the Shoreline Master Program. A shoreline variance will be granted only after the applicant can demonstrate the criteria in WAC 173-14-150, as amended, are met.*

We conclude that the variance application for the proposed dock will be granted only if Hoschek can meet all of the criteria imposed by WAC 173-14-150(3) for developments waterward of the ordinary high

water mark. Each of the criteria will be examined below.

VI

(3)(a): That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes a reasonable use of the property not otherwise prohibited by the master program.

VII

The City contends that, because Hoschek can use his ten foot strip for various permitted uses such as fishing or swimming to name a few possibilities, he already has a reasonable use of his property and the variance must be denied. To support its position, the City cites three Board decisions, all of which can be distinguished from the present case:

Hoschek(s) v. City of Mercer Island and DOE, SHB No. 86-53 (1987) *supra*. The Board denied the variance application, not because uses other than boating were available to the applicants, but because access to a boat could be had at that time directly from the bulkhead steps, and, therefore, boating was not denied to the applicants.

Simchuk v. DOE et. al., SHB No. 84-64 (1985) and Strand v. Snohomish et al., SHB 85-4 (1985). In both cases the Board denied a variance because other uses than that for which the variance was sought were available to the applicant. But, in both of these cases, the relevant master plan required that applicants must show that they

could not make any reasonable use of their property, and, where, a master plan imposes a more stringent requirement than the WAC, the master plan requirement applies. In the instant matter, there is no such more stringent requirement in the City's SMMP.

VIII

Early issues of WAC 173-14-150(1) required that a variance must be denied if the applicant, without the variance, could not "make any reasonable use of his property". By 1983 the WAC had been amended to require that the applicant must show: "That the strict application of the bulk, dimensional or performance standards ... precludes a reasonable use of the property...".

IX

When the language of a statute, ordinance, or rule is changed, it is presumed that a change in the purpose of the law was intended. Chandler et. al. v. Otto, 103 Wn.2d (1984). We interpret the change in language of the WAC as being the Department of Ecology's recognition that the original "any reasonable use" criterion imposed a requirement which was practically impossible to meet since any piece of land can be used for some purpose, however unsatisfactorily, and that the Department replaced it with language which is directed instead to the particular project which has been proposed by an applicant.

X

In Barer v. City of Seattle, SHB No. 91-58 (1992), the Board found that, under the present WAC where dimensional variances are concerned, the issue is not whether the property as it now exists constitutes a reasonable use, but whether the proposed project comprises a reasonable use. The Board further found that the limitation upon what is reasonable must be found by reference to what is allowed in the neighborhood where the site is located. We apply those same criteria to the present Hoschek application.

XI

From our analysis and that of Barer above, we conclude:

That, because Hoschek seeks a dimensional variance under the applicable WAC, the issue is not whether he can make any other reasonable use of his land but whether his proposed project is a reasonable use of the land,

That his proposed dock is a reasonable use of his land not only because both of his adjoining neighbors have docks but also because they exist in large numbers throughout the City waterfront,

That docks are not otherwise prohibited by the SMMP or any other law, and

That the requirements of WAC 173-14-150(3)(a) do not bar the variance applied for.

(Note: for a different analysis of the par. (3)(a) requirement, see the Concurring Opinion in Attachment A to this opinion.)

XII

Because the Board in 1987 had already found that a variance must be denied because the applicants could not satisfy the requirements of the first condition, par. (3)(a), it went no further, as we must, in considering the remaining WAC requirements.

(3)(b) then requires that the proposal be consistent with the criteria established under (2)(b) through (e) which we will consider under their paragraph (2) letter designations.

XIII

(2)(b). That the hardship ... is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions.

XIV

In our 1987 Hoschek decision, the Board concluded, as we do now, that regardless of when the Hoschek/Sayers subdivision occurred, Hoschek has no vested rights free from shoreline regulations and that his rights or benefits date back only to the time he applied for his permit. Accordingly, there is no "unique condition" because of vesting.

Any further question of "unique conditions such as irregular lot shape, etc." has already been settled by the King County Court in City of Mercer Island v. Hoschek et. al, No. 88-2-00269-0 (1990) where the

Court found on page 2, par. 5 that "The waterfront in this property is fairly unique". We recognize the word "unique" as being the operative word in the finding since the WAC makes no provision for degree of uniqueness.

XV

The WAC's words "such as" indicate that the conditions then cited are not comprehensive, and we recognize another compelling condition in this matter. As noted in our Findings of Fact, par. V, in 1990 the King County Court issued a permanent injunction which on page 1 of the Order, par. 2 enjoined Hoshek "from using ... any dock, float, buoy, or waterfront structure in front of his property without obtaining a valid permit..." On page 2, par. 3, the Court ordered that any boat anchored in front of Hoschek's property "shall not be located so close to the shore as to make it possible to board the boat directly from the anchored position to the shore for boarding purposes."

XVI

Hoschek's bulkhead steps into the water are a waterfront structure, so by the Court's order he is prohibited from bringing a dinghy, canoe, or any type of boat to his steps for boarding. Consequently, the only way he or anyone else can get to a boat which he has anchored offshore, in accordance with the Court's order, is to wade or swim to it.

This 1990 decision nullifies the reason given in our 1987

variance denial: that "Much of the time access to a boat can now be had from the existing bulkhead steps." Now, under the Court's order, access from the steps to a boat is not permissible, and we consider the necessity to swim or wade to an anchored boat to be a unique condition.

XVII

The argument has been advanced that Hoschek must be denied a variance because his hardship was created by his own action of buying the property when he knew or should have known of the setback requirements. Under this reasoning, the right to a variance for any property would be extinguished the first time the property was sold after the SMA's enactment, and no one who ever bought a piece of property with a nonconforming characteristic would then be able to obtain a variance even though the nonconformance in the property had been created years before the SMA became effective. We cannot accept such a strained interpretation.

XVIII

The hardship was created at the time the land was subdivided into its present configuration by Mrs. Painton in the 1960's before the SMA was enacted in 1971, not by Hoschek's purchase of the property. What Hoschek purchased with his property was not only a dimensional setback problem which requires a variance for his proposed project, but also the statutory and SMMP right to seek such a variance.

(For a further analysis of this issue, see both Concurring Opinion, Attachment A, and Memorandum, Attachment B, to this opinion.)

XIX

We conclude:

That Hoschek's hardship is caused by the unique dimensional condition of his lot size and by the court-ordered prohibition from docking any boat at his shoreline,

That the hardship is not due to deed restrictions or by his own actions, and

That the requirements of WAC 173-14-150(2)(b) do not bar the variance applied for.

XX

(2)(c). That the design of the the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment.

XXI

The City argues that this variance would seriously impact any future development on the property of Hoschek's neighbor to the north, Radovich, by reducing his (Radovich's) available space because of setback requirements. While this concern may have been Radovich's basis for denying a waiver to Hoschek, it does not fall within the criteria of (2)(c) which requires that the development "will not cause adverse effect to adjacent properties". We construe the word "effect"

to refer to a present adverse physical or environmental effect, not a possible dimensional effect which may or may not occur sometime in the future.

XXII

We find an analogous precedent in Posten v. Kitsap County et al., SHB No. 86-46 (1987) where, at page 15, the Board found that "...whether a development ... will help or hurt a neighbor's business is not ... within RCW 90.58.020" unless it "is likely to produce adverse physical effects on the shoreline". Here there is no evidence that the proposed development will cause any present physical or environental damage to Hoschek's neighbors' shorelines or to his own.

(We note that a mutual setback waiver with Hoschek such as Radovich has with his neighbor to his north would have disposed of his concern; however, having decided against such a waiver, Radovich will still have available to him the right to apply for a setback variance if he should decide on an expansion to his dock in the future.)

XXIII

Hoschek's neighbor to the south, Mrs. Sayers, claims that a Hoschek dock would be a safety hazard to her children swimming from her dock. It is not clear how a dock can be a safety hazard to swimmers, and we reach the same conclusion with regard to her claim that the dock would intrude on her privacy. A boat moored at a dock will cause less of a threat to her safety and privacy than a boat

being tied to a buoy, and then swinging from side to side from the force of the wind or water currents.

XXIV

We conclude:

That a dock on the Hoschek property is compatible with the other docks in the area,

That the project will not cause adverse effects to adjacent properties, and

That the requirements of WAC 173-14-150(2)(c) do not bar the variance applied for.

XXV

(2)(d). That the requested variance does not constitute a grant of special privilege not enjoyed by the other properties in the area, and is the minimum necessary to afford relief.

We conclude:

That the set back waiver enjoyed by Radovich precludes a Hoschek variance from being a grant of special privilege not enjoyed by other properties in the area and that a dock is the minimum facility required to afford Hoschek relief from the unique necessity of swimming or wading to his boat.

XXVI

(2)(e). That the public interest will suffer no substantial detrimental effect.

Public interest, in the past, has not been a consideration where setback waivers have been granted without question, nor do we find any evidence to support any adverse effect on public interest resulting from the proposed Hoschek dock.

Accordingly, we conclude:

That the requirements of WAC 173-14-150(2)(e) do not bar the variance applied for.

XXVII

(3)(c). That the public rights of navigation and use of the shorelines will be adversely affected.

We conclude:

That public navigation will not be affected by a boat moored securely to a dock to the extent that it might be by a boat moored to a buoy or anchored and swinging from side to side, and

That the requirements of WAC 173-14-150(3)(c) do not bar the variance applied for.

XXVIII

(4) In the granting of variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the same area.

XXIX

Considering the number of docks already existent in his neighborhood and the City as a whole, both with and without setback

waivers, we can give little credence to concerns that the Hoschek project will create or add anything to the cumulative impact of additional requests.

We conclude:

That the requirements of WAC 173-14-150(4) do not bar the waiver applied for.

XXX

However, the present design could, and probably would, result at times in a number of boats being moored along the two sides of the dock, posing a safety hazard for the neighbors' normal waterfront activities, especially swimming, because of the increased water traffic of boats approaching or leaving the dock and the intrusion of docked boats into the neighbors' swimming areas. We conclude that the dock design must be modified to minimize such interference.

XXXI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

THAT the denial of a variance permit (MIV 90-32) to Douglas Hoschek by the City of Mercer Island is REVERSED and that the City shall issue said permit to Douglas Hoschek for a dock with the following conditions:

The dock shall extend a maximum of 40' into the water with its southern edge along the southern line of Hoschek's property. The dock shall be 30" wide with a see-through 36" inch high hand rail along its southern side. Boat moorage shall be allowed only for Hoschek and/or his guests, and such moorage shall be only on and parallel to the north side of the dock with no infringement on the neighboring northern property.

DONE this 23rd day of November, 1992.

SHORELINES HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

DAVID WOLFENBARGER, Member

MARK ERICKSON, Member
(Concurring Opinion)
(See Attachment A)

(See Minority Opinion)
NANCY BURNETT, Member

(See Minority Opinion)
ROBERT V. JENSEN, Member

JOHN H. BUCKWALTER
Administrative Appeals Judge
Presiding

CONCURRING OPINION

MEMORANDUM

TO: Hal Zimmerman, John Buckwalter, Dave Wolfenbarger
Nancy Burnett; Shoreline Hearings Board

FROM: Mark Erickson

DATE: October 13, 1992

RE: Douglas Hoschek v. City of Mercer Island and DOE,
SHB No. 91-42

I have reviewed the proposed Final Findings of Fact, Conclusions of Law and Order in the above matter. I agree with the decision but have a couple of comments on the variance criteria applied.

First, I believe the decision overstates the significance of the change in WAC 173-14-150(2)(a) dealing with reasonable use of property. The old language ("make any reasonable use of this property") I agree was very difficult to meet as in almost any case some use can be conjured up no matter what the dimensional difficulties may be. Likewise, I believe that the interpretation given the new language in the WAC by this proposed decision swings the pendulum too far the other way. The interpretation given in the decision is that in WAC 173-14-150(2)(a) the issue is not whether the applicant can make any other reasonable use of this land but whether his proposed project is a reasonable use of the land. By this construction, it would appear that if an applicant would propose any use for an undersized or irregular lot which is compatible with or common to other uses in the vicinity (even though the other lots may not have the same dimensional deficiencies) the applicant automatically passes that variance criterion if a strict application of the dimensional requirements precludes that use. I believe that this would weaken that variance criterion beyond what was intended by the change in the WAC.

A better interpretation in my view is that the change requires that the Board look at the uses which remain after a strict application of the dimensional requirements and determine,

as a whole, if those uses give the owner a reasonable use of his property. Thus, while some uses otherwise enjoyed in the vicinity may be precluded and others allowed, the question is whether from an overall point of view the remaining uses, as a whole, give the owner a reasonable array of opportunities for the use of his/her property. Under this approach an applicant would not have to prove that no reasonable use of his property remains nor would he/she be automatically entitled to a variance if the proposed used is "reasonable" in light of the neighboring uses on lots which do not suffer the same dimensional difficulties. My interpretation would be somewhere in between the two extremes; where the Board would look at the uses remaining and decide whether those uses, in light of the degree of dimensional non-compliance and the uses enjoyed by others in the vicinity, as a whole are reasonable.

Applying this interpretation to the Hoschek case, however, leads me to the same conclusion as that set out in the proposed Final Findings of Fact, Conclusions of Law and Order. The Superior Court order already prohibits the applicant from tieing a boat at water's edge at the end of the panhandle. While the applicant may have the right to stand on the property and maybe wade into the water, that is probably the limit of uses which could occur without a dock. In my view, if the variance was not granted for a dock, the remaining uses would not as a whole give the applicant a reasonable use of his property. Therefore, it is my conclusion that a strict application of the dimensional, i.e. setback, standards would preclude the applicant a reasonable use of his property and the requirements of WAC 173-14-150(2)(a) are thus met. If the author of the Findings and Order could incorporate this analysis in the opinion, I would be happy to sign it.

I agree with the reasoning set forth in Paragraphs XVII and XVIII relating to whether the dimensional hardship was created by the actions of the applicant in buying his property. Nancy, in her dissent, states that Mr. Hoschek was or should have been aware of the size of the lot and the corresponding 10' setback requirements when he purchased the lot. As a result, she concludes that the variance request was a result of his own action. This reasoning, I believe, is specifically countered by the language of the WAC itself. WAC 173-14-150(2)(b) refers specifically to irregular lot shapes or sizes or natural features as one of the basis for a variance. Clearly the authors of the WAC envisioned man-made conditions

that could qualify otherwise the term "or natural features" would not have been necessary. In addition, it is clear that most irregular lot shapes are man-made at the time a plat is approved and are not necessarily related to natural features of the land. Quite often lots are configured to give various internal lots access to rights-of-way or, as in this case, to water frontage. This does not require that the natural topography be unique. Therefore, the fact that a lot is irregular or undersized and that this feature is man-made or known by the applicant when the property was purchased does not necessarily disqualify the property for a variance. Otherwise, the WAC would only have allowed irregular lot sizes or shapes caused by some physical feature of the land as a qualified basis for a variance. The WAC does not make such a distinction.

In addition, if in fact the Painton subdivision was applied for prior to the enactment of the 10' setback requirements, this is more evidence that the unique condition was not created by the applicant's own actions. If the original platter was not subject to the dimensional requirements in question when he/she originally applied for the plat, it would be hard to conclude that non-conformance thereto was of his/her own making.

I concur with the remaining sections of the proposed Final Findings and Order. The only qualifier is that I believe there is a misspelling of the word distinguished on Page 9 in Paragraph VII and on Page 15, Paragraph XXI reference should be to the city, not the county.

I hope these comments are helpful in your preparation of a Final Findings of Fact, Conclusions of Law and Order. If you have any questions, please give me a call.

MOE:kap

SHB No. 91-42, Attachment A

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10/13/92

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

DOUGLAS HOSCHEK, Appellant. v THE CITY OF MERCER ISLAND, Respondent.	)	SHB No 91-42 MINORITY FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

This matter was heard by the Shorelines Hearings Board ("Board") on August 5, 1992 in Mercer Island, Washington Sitting for the Board were Harold S Zimmerman, Chairman, Nancy Burnett, Mark Erickson and David Wolfenbarger. Board members Annette S. McGee and Robert Jensen read the transcript and reviewed the record. John H. Buckwalter, Administrative Appeals Judge, presided

The proceedings were taped They were also recorded by Lenore S Elliott, court reporter, affiliated with Gene S Barker and Associates, Inc., of Olympia, Washington

Douglas Hoschek appeared pro se. The City of Mercer Island ("Mercer Island") appeared through Wayne Stewart, Assistant City Attorney.

Having heard the testimony, examined the exhibits, heard oral argument, and reviewed the briefs submitted by Mercer Island the Board makes these

FINDINGS OF FACT

I

The Department of Ecology approved Mercer Island's master program on September 24, 1974. Douglas Hoschek purchased the subject property in 1981. His parents acquired their interest in the property in 1983.

II

The Hoschek's property is shaped roughly like a frying pan, with the panhandle forming a strip 10 feet wide. The waterfront portion of the property is 10 feet wide where the panhandle meets the shore of Lake Washington, a shoreline of state-wide significance, under the Shoreline Management Act.

III

In 1986, Mr. Hoschek's parents applied for a shoreline management variance permit to construct a mooring pier and boat lift on their 10 feet of waterfront. The pier would have extended 28 feet into the lake from the existing bulkhead. The pier would have been a foot and half to three feet wide, except for that portion including the boat lift. At that point the pier and boat lift would have occupied all but six inches of the 10 foot strip.

IV

Mercer Island affirmed the decision of the hearing examiner to deny the variance on September 22, 1986. Mr. Hoschek's parents appealed the denial to the Board.

V

Douglas' parents are an older, retired couple, contended that the variance should be granted because a fixed pier would simplify their ingress and egress to a boat.

VI

Douglas Hoschek, after his purchase, built steps from the existing five foot high bulkhead, providing ready access to the water. A small motor boat was moored to a buoy in front of the 10 foot strip where Douglas' parents purchased the property. This buoy was eventually removed.

VII

The Board affirmed Mercer Island's denial of the variance on September 11, 1987. Frank and Dorothy Hoschek v. City of Mercer Island & DOE, SHB No. 86-53 (1987). No appeal was ever taken from that decision.

VIII

Subsequently, Douglas Hoschek purchased a pontoon boat in Oregon and moored it in front of the 10 foot property strip. It was anchored by the lake and tied tightly to the bulkhead streps, so that one could step onto it directly from the shore. Essentially, the pontoon boat served as a dock and was used as such. It would have been possible to anchor the boat at the stern and leave it off shore a number of feet, so as to protect it, but by cinching it tight to the bulkhead, it came to serve as a dock.

IX

Mercer Island wrote to Mr. Hoschek, to advise him that the use of the pontoon boat, as a dock was illegal. Nevertheless, Mr. Hoschek continued this use unabated for more than one year after receiving such notice.

X

The City ultimately obtained a temporary injunction for removal of the boat and use of a boat as a dock, on his property. City of Mercer Island v. Frank and Dorothy Hoschek,

et. al., King County Superior Court No. 88-2-00269-0 (March 12, 1990). The Court's Findings of Fact conclude with the statement that Douglas Hoschek intended to continue his use of the property for access to pleasure boats, to the maximum extent permitted by law.

XI

Based on Findings of Fact and Conclusions of Law, the court entered a permanent injunction which enjoins Douglas Hoschek:

> from using, or permitting to be used, any dock, float, buoy, or water front structure in front of his property at 5435 West Mercer Way without having obtained a valid permit for such use from the City of Mercer Island, Washington.

Mercer Island v. Hoschek, Order of Permanent Injunction and Suspended Fine, para. 1 at 1.

XII

The injunction also contained the following language:

> The limitations set forth in paragraph 2 shall not be interpreted so as to preclude the defendant from anchoring a boat in front of his property provided that any boat which is anchored shall not be located so close to the shore as to make it possible to board the board directly from the anchored position to the shore for boarding purposes.

Id. at para. 3, p. 2.

XIII

On September 27, 1990, Douglas Hoschek applied for a shoreline management variance permit to build a 60 x 6 boat pier perpendicular to the bulkhead. This permit was denied by the hearing examiner in a written decision dated March 26, 1991. Mercer Island affirmed the hearing examiner's decision on June 24, 1991.

XIV

There are many docks surrounding Mercer Island. However, it has not been shown that any such docks were unlawfully constructed at the time of their installation.

XV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

Variances are designed as escape valves from imperfect land use ordinances 3 R. Anderson. American Law of Zoning Ed., Sec. 19.10 (1986). This mechanism allows governmental entities to avoid application of a land use restriction, which literally applied, would deny a property owner all beneficial use of the property. Id. at Sec. 20.02.

II

Variances are exceptions to the rule. The Shoreline Management Act is to be liberally construed on behalf of its purposes. RCW 90.58.900; Clam Shacks v. Skagit County, 109 Wn.2d 91, 93, 97, 1743 P.2d (1987). Concomitantly, exceptions to its regulations must be strictly construed. See Mead School Dist. v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding that the liberal construction command of the Open Public Meetings Act implies on intent that the act's exceptions be narrowly confined.)

III

The Mercer Island Shoreline Master Program applies the criteria of WAC 173-14-150 to shoreline variance permit applications.

IV

The purpose of allowing variances is set forth in WAC 173-14-150, as follows:

> The purpose of a variance permit is strictly limited to granting relief from specific bulk, dimensional or performance standards set forth in the applicable master program where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the master program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020. (emphasis added.)

V

WAC 173-14-150 contains two sets of criteria for variances. The stricter of the two criteria applies to this proposed pier because it would lie waterward of the ordinary high water mark.

VI

The applicant under RCW 90.58.140(7) bears the burden of proving that his project can meet each and every one of the following criteria contained in WAC 173-14-150:

> That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes a reasonable use of the property not otherwise prohibited by the master program.

WAC 173-14-150(3)(a)

> That the hardship described [above] . . . is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;

> That the design of the project is compatible with other permitted activities in the areas and will not cause adverse effects to adjacent properties on the shoreline environment;

That the requested variance does not constitute a grant of special privilege, not enjoyed by the other properties in the area, and is the minimum necessary to afford relief;

That the public interest will suffer no substantial detrimental effect.

WAC 173-14-150(2)(b), (c), (d), (e)

In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if variances were granted to other developments in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

WAC 173-14-150(4)

VII

The majority opinion attempts to place significance on the change in Ecology's variance regulation from "requiring that the applicant demonstrate preclusion of "any" reasonable use, to a demonstration of preclusion of "a" reasonable use. We are unconvinced that the change has the effect claimed by the majority. More importantly, the change is totally irrelevant to this case, because it preceded the Board's earlier decision affirming denial of a variance to Mr. Hoschek's parents, for a similar project. Hoschek v. Mercer Island, SHB No. 86-53 (1987).

VIII

The Board previously concluded that:

Recreational use of the shoreline, including boating, is assuredly consistent with the master program. However, under the facts, such shoreline use from the Hoschek property is not precluded for lack of a pier and boat lift. Much of the time access to a boat can be had from the existing bulkhead steps. At other times, such access is possible, though with some difficulty.

Hoschek v. Mercer Island, at Conclusion of Law II, p. 8.

IX

The majority interprets the Superior Court's order in Mercer Island v. Hoschek, as dictating a different result in this case from the Board's 1987 decision. We disagree. The majority erroneously concluded that "under the Court's order, access from the steps to a boat is never permissible." Majority Opinion, Conclusion of Law XVI, at 14.

X

The obvious intent of the Superior Court Order is to preclude Mr. Hoschek from affixing a boat to his bulkhead such that it acts like a dock, absent approval for such a use under the Shoreline Management Act. The Court concluded that, as a matter of law, the pontoon boat which Mr. Hoschek had previously moored to the bulkhead, was a "waterfront structure, a dock and a float", not permitted without a variance. Mercer Island v. Hoschek, at Conclusion of Law 5, p. 5.

XI

The order enjoined Mr. Hoschek from using any dock, float, buoy or waterfront structure in front of his property without a valid permit from the City of Mercer Island. Id., at Order of Permanent Injunction and Suspended Fine, para. 2, p. 1. The intent of this paragraph is to prohibit Mr. Hoschek from "anchoring a boat so close to shore as make it possible to board the board directly from the anchored portion to the shore for boarding purposes." Id., at para. 3, p. 2. The paragraph was not intended to prevent Mr. Hoschek from anchoring a boat or boats in front of his property, or from using such a boat or boats for legal uses allowed the general public, such as "fishing, sunbathing and sitting." Id., at para. 3 and 4.

XII

The above proscriptions moreover, do not, and obviously were not intended to prohibit Mr. Hoschek from anchoring a boat offshore and attaching to the anchor buoy a line and pulley for a dinghy. A dinghy could be pulled to shore, to enable one or more people to float from the shore to the anchored boat. The dinghy need not be affixed to the shore, as was the pontoon, boat but could be fixed in a position off shore by the pulley rope which would be fastened to the shore. Such systems are commonly used for mooring boats, in lieu of fixed piers. No shoreline variance permit would be required for such a system.

XIII

Mr. Hoschek has a reasonable use of the property for mooring a boat, which would not be denied to him by denial of this variance, nor by the Superior Court decision. Thus, the variance was properly denied under WAC 173-14-150(3)(a).

XIV

Mr. Hoschek maintains that he has satisfied the hardship requirements for a variance. We conclude however, that he purchased the property with constructive knowledge of the setback requirements, from which he now seeks relief. A person who purchases land with knowledge of zoning restrictions is not qualified to receive an area variance which relieves him from such restrictions. 3 R. Anderson, American Law of Zoning, 3d Sec. 20.58 (1986).

> A person who purchases land with knowledge, actual or of the zoning restrictions which are in effect at the time of such purchase is said to have created for himself whatever hardship such restrictions entail.

Montgomery v. Board of Zoning Adjustments of New Orleans, 488 So. 2d 1277 (La. 1988). Accord, Martin v. Board of Adjustment of Enterprise, 414 So.2d 123 (Ala. 1980); Johnson v. Robinson, 309 NW 2d 526 (Mich. 1984); Abel v. Zoning Board of Appeals of City of

Norwalk, 374 A.2d 227 (Conn. 1977); Goslin v. Zoning Board of Appeals of City of Park Ridge, 351 NE 2d 299 (1976); Glickman v. Parish of Jefferson, 224 So.2d 141 (1969).

XV

There is authority for a contrary view. Fail v. La Porte City of Board of Zoning Appeals, 355 NE 2d 455 (1976); City of Coral Gables v. Geary, 383 So.2d 1127 (Fla. 1980); Landmark Universal, Inc. v. Pitkin County Board of Adjustment, 579 P.2d 1184 (Colo. 1978). The State of Washington, however, inclines toward the stricter rule. In Lewis v. Medina, 87 Wn.2d 19, 548 P.2d 1093 (1976), the Supreme Court found it to be a self-imposed hardship, where a son, who had inherited property from his brother, had participated in the original subdivision of land which reduced it below minimum lot size. There is no substantial difference between the subdivider of a non-conforming lot, and the purchaser of such a lot. Both persons are presumed to have knowledge of existing land use restrictions. Were this not the case, important land use restrictions, such as those enacted pursuant to the Shoreline Management Act, could, in many instances, be avoided by the sale of the restricted property. In the Medina situation, for example, a subsequent purchaser of the lot from the son could argue that he had not created his own hardship. We are aware of no Shoreline Management Act policy that would justify such a result.

XVII

On the other hand adoption of such a rule would 1) tend to erode the existing shoreline regulations over time, and 2) constitute a windfall to a property owner who had no legitimate expectation of a vested right to a variance from the land use restrictions that existed when that owner purchased the property.

XVIII

The only previous case in which the Board directly addressed this issue is Lee Nichols v. DOE, SHB Nos. 81-5, and 81-11 (1981). There the owner purchased the lot before the controlling setback requirement was enacted. The Board distinguished Medina on precisely that ground, reserving for itself the right to apply the rule, where purchase of the property occurs after establishment of the restriction. Nichols at 6-7.

The Board later affirmed denial of a variance where the owner deeded away property, leaving himself a lot upon which he could not meet the shoreline setback. Robert E. Wiswall v. Clark County, SHB No. 90-37 (1991).

XIX

The Board in Barer v. City of Seattle, SHB No. 91-58 (1992) did conclude that a hardship existed, where the property had been purchased after the setback had been established. However, because the Board neither discussed, nor cited any authority regarding the question of whether a purchaser of restricted property creates his own hardship, we do not regard that case as precedent on this issue.

XX

Whether the lot was created in 1961 or 1966 is irrelevant. Mr. Hoschek was presumed to know of the size of his lot, and the Mercer Island Master Program which calls for 10 foot sideyard setbacks from the property line. Thus, the variance request was the result of his own action.

XXI

Mr. Hoschek has not met the requirement that his proposal be the minimum necessary to afford relief. WAC 173-14-150(2)(d). The proposal of his parents would have extended 28 feet out into the water. This proposal more than doubles that to 60 feet. There has been no

demonstration why Mr. Hoschek needs more than the original 28 feet applied for, to moor a boat.

XXII

If this variance were approved, it would encourage others with unusual or irregular property to apply for variances, encouraging inappropriate use of the shoreline.

XXIII

There is another fundamental problem with the majority opinion. The Order requires that Mercer Island issue a variance permit for a dock configuration, for which Mr. Hoschek never applied. A shoreline permit is limited to the construction and uses expressly sought and represented in the application for the permit. Tarabochia, et. al. v. Town of Gig Harbor, et. al., SHB No. 77-7 (1977). We can find no precedent in which this Board has redesigned a shoreline application, as opposed to adding conditions to the permit. See San Juan County v. Natural Resources, 28 Wn. App 796, 798, 800, 626 p.2d 995 (1981) upholding Board's authority to add an 11th condition to the 10 approved by the County). In Tarabochia, the Town of Gig Harbor did not redesign the proposed floating dock, but rather limited its length from 130 to 60 feet. This decision was sustained by the Board.

In contrast, the majority opinion here would create a new dock configuration, for which no site diagram was ever submitted. WAC 173-14-110 requires that a shoreline application show the dimensions and location of proposed structures. This Board has held that its review is limited to the application before it. Concerned Citizens of South Whidley, et al. v. Island county and Milby, SHB No. 77-11 (1970). We can understand the majority's desire to streamline the review process. However, in our opinion, the Legislature never intended to authorize the Board to redesign projects that come before it.

XXIV

We also note that the design developed by the majority is even closer to the design originally disapproved by this Board in 1987, than Mr. Hoschek's present design. This is further supports our conclusion that the Board has improperly reversed its earlier decision.

XXV

Mr. Hoschek has failed to satisfy his burden of proving that he has satisfied the criteria for granting a variance under the Shoreline Management Act. He has not demonstrated extraordinary circumstances that would justify varying Mercer Island's setback requirements. Particularly, he has not shown any persuasive reason why this Board should reverse its 1987 decision affirming denial of the variance.

XXVI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

MINORITY OPINION

If we had been in the majority, we would have ordered that Mercer Island's denial of the shoreline variance permit to Douglas Hoschek be affirmed.

DONE this 23rd day of November, 1992.

SHORELINES HEARINGS BOARD

ROBERT V. JENSEN, Attorney Member

NANCY BURNETT, Member

S91-42D